

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAVIS ANTHONY ANDREWS,

Defendant-Appellant.

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UNPUBLISHED

June 27, 2006

No. 259834

Washtenaw Circuit Court

LC No. 03-002138-FC

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of conspiracy to commit armed robbery, MCL 750.157a, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to concurrent terms of 20 to 40 years' imprisonment on the conspiracy conviction, and two to five years' imprisonment on the felon in possession of a firearm conviction. Defendant was found not guilty of felony murder, MCL 750.316, and armed robbery, MCL 750.529, and a charge of felony firearm, MCL 750.227b, was dismissed by stipulation after the jury was unable to reach a verdict on that count. Because any improper admission of telephone records as evidence was harmless and the trial court properly scored relevant offense variables, we affirm defendant's convictions and sentence, but remand for the ministerial task of correcting his judgment of sentence.

Defendant's convictions arise from the robbery and shooting of Ronald Hargrove. Testimony indicated that defendant and Victor Parker conspired to set up Hargrove so they could rob him. Parker met Hargrove at a local party store and defendant came up to them with a gun, attempting to rob Hargrove. Hargrove, however, ran toward the party store. Minutes later, Hargrove was found lying in the roadway, shot several times. Hargrove died from a gunshot wound to his chest.

Defendant first argues that the trial court erred when it admitted cell phone records of various witnesses because they were not properly authenticated, were inadmissible hearsay, and were irrelevant and prejudicial. We normally review a trial court's decision on the admissibility of evidence for an abuse of discretion. *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004). However, at the trial court, defendant only argued that the records were not properly authenticated. The other issues now raised by defendant with respect to the cell phone records, then, are reviewed for plain error affecting defendant's substantial rights. *People v Dewald*, 267

Mich App 365, 377; 705 NW2d 167 (2005) (stating that an objection on one ground is insufficient to preserve an appellate attack on a different ground).

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. MRE 901(a). In the present matter, the prosecutor admitted into evidence the cell phone records for Charlene Evans, Fred Blackmon, Victor Parker, and a number that the prosecutor believed belonged to defendant, although they were not characterized as defendant's phone records to the jury. The prosecutor offered the testimony of Washtenaw County Sheriff's Department Detective Robbins to authenticate the records. Robbins testified that he often retrieved telephone records for cases in Washtenaw County and that the procedure used was to call the phone company, explain what records he wanted, and then fax the phone company a subpoena. Robbins testified that the phone companies then faxed the particular phone records back to him at the sheriff's department. Robbins stated that the phone records he received for this case looked consistent with phone records he had received previously and that they all appeared to come from the places where he sent the faxes requesting the information. Robbins also testified that he cannot be sure that the records were correct, only that the records the prosecutor wanted admitted into evidence were the records he received.

The trial court found that the records were authenticated under MRE 901 because they were produced pursuant to subpoenas and the records themselves show where they came from and to which phone number they pertain. Robbins's testimony that he sent subpoenas to specific telephone companies and the telephone companies faxed the specifically requested records to him provided a sufficient basis for the court to find the records to be authenticated. The trial court thus did not abuse its discretion in concluding that the records were admissible under MRE 901.

Defendant also argues, however, that the telephone records constitute inadmissible hearsay. MRE 803(6), the business records exception to the hearsay rules, provides for admission of business records with testimony from "the custodian or other qualified witness" that the records were kept in the course of regularly conducted business. Generally, telephone records would be admissible under MRE 803(6). In this case, though, the prosecutor did not offer any testimony from the records custodian or other qualified witness that would show that the phone records met the exception under MRE 803(6). The only testimony the prosecutor offered was that of a detective who admitted that he did not know if these phone records were kept in the phone companies' regular course of business. Therefore, the phone records were hearsay and not shown to fit under the hearsay exception in MRE 803(6). As such, it was plain error for the trial court to allow their admission.

Even though we conclude that the trial court erred in admitting the phone records, defendant has not shown that reversal is required. "Evidentiary error does not merit reversal unless it involves a substantial right, and after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative." *Moorer*, *supra* at 74.

Here, the phone records appeared to play a limited role in defendant's trial. Testimony was presented indicating that Hargrove informed officers before he died that Parker robbed him. Sean Dykhouse, the individual that initially found Hargrove in the roadway, also testified that he

heard Hargrove tell the officers that Victor and Arvin or Marvin did that to him. Additionally, Sheena Webb testified that she heard Parker and defendant discussing their plans to rob someone. Parker also testified that he and defendant made plans to rob Hargrove and that he obtained a gun for that purpose and gave it to defendant. This evidence, without reference to any phone records, strongly supported defendant's conspiracy to commit armed robbery conviction.

There was also testimony from at least two individuals that defendant had possession of a firearm at some point during the evening of the incident, and the parties stipulated that defendant had a previous felony conviction. There was strong evidence, then, without reference to the phone records, to support defendant's felon in possession of a firearm conviction. Accordingly, we conclude that the erroneous admission of these records did not affect defendant's substantial rights. *Dewald*, *supra* at 377.

Defendant next argues that the trial court erred in scoring offense variables (OVs) 1 and 3 and that his sentence violated his right to a jury trial and due process rights. We disagree. This Court reviews the trial court's scoring of a sentencing variable for clear error. *People v Witherspoon*, 257 Mich App 329, 335 n 1; 670 NW2d 434 (2003). "Scoring decisions under the sentencing guidelines are not clearly erroneous if 'there is *any* evidence in support' of the decision." *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996) (emphasis in *Witherspoon*).

OV 1 addresses aggravated use of a weapon. Defendant was scored 25 points for OV 1 because "[a] firearm was discharged at or toward a human being." MCL 777.31. OV 3 requires assessment of points for physical injury to a victim. Defendant was scored 100 points on OV 3 because a victim was killed. MCL 777.33. "[F]or purposes of OV 3, the term 'victim' includes any person harmed by the criminal actions of the charged party." *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003). For both OVs, the statute requires that in multiple offender cases, if one offender is assessed points, all offenders shall be scored the same number of points. MCL 777.31(2)(b); MCL 777.33(2)(a).

In this case, there was evidence to support defendant being scored 25 points for OV 1 and 100 points for OV 3. Defendant's criminal act, conspiracy to commit armed robbery, *resulted in* a gun being pointed at a human being and the victim's death, even if the jury did not necessarily find that defendant himself pointed a gun at or killed Hargrove. More importantly, defendant's co-conspirator was scored 25 points for OV 1 and 100 points for OV 3. Under MCL 777.31(2)(b) and MCL 777.33(2)(a) defendant was to be scored the same number of points as his co-conspirators. See *People v Morson*, 471 Mich 248, 259; 685 NW2d 203 (2004). Thus, the trial court did not clearly err in its scoring of OVs 1 and 3.

Defendant next argues that the scoring of OVs 1 and 3 in particular and his sentence in general violated his Sixth Amendment right to a jury trial and his due process rights. This argument is based on *Blakely v Washington*, 542 US 296, 303; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, 543 US 220, 244; 125 S Ct 738; 160 L Ed 2d 621 (2005). However, under controlling Michigan authority, *Blakely* does not apply to sentences imposed in Michigan. *People v Wilson*, 265 Mich App 386, 399; 695 NW2d 351 (2005). While defendant argues that our Supreme Court's discussion in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004) that *Blakely* is not applicable to Michigan's sentencing system is non-binding,

we rejected this argument in *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881, 693 NW2d 823 (2005).

Defendant finally argues that his judgment of sentence does not clearly reflect that he was convicted of conspiracy to commit armed robbery. Defendant's judgment of sentence states that he was convicted of "(c) armed robbery" and lists a charge code for robbery. To prevent any confusion, we remand this case to the trial court for the ministerial task of correcting the judgment of sentence to clearly reflect that defendant's conviction was for conspiracy to commit armed robbery. See *People v Avant*, 235 Mich App 499, 521; 597 NW2d 864 (1999) (remanding to correct error in judgment of sentence).

Defendant's convictions and sentence are affirmed. However, we remand this case to the trial court for the ministerial task of correcting defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Deborah A. Servitto